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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. NANCY R. HEINEN, Defendant.	Case No.: C-07-2214(JF) **NON-PARTY WENDY HOWELL'S MOTION TO QUASH SUBPOENAS OR, IN THE ALTERNATIVE, FOR ISSUANCE OF A PROTECTIVE ORDER** Magistrate Judge Howard R. Lloyd Date: December 11, 2007 Time: 10:00 a.m. Dept: Courtroom 2, 5th Floor

Dockets.Justia.com

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on December 11, 2007 at 10:00 a.m., or as soon thereafter as the matter may be heard in the courtroom of Magistrate Judge Howard R. Lloyd, United States District Court, 280 South 1st Street, San Jose, CA 95113, Non-Party Wendy Howell ("Howell") will, and hereby does, move the Court to quash nine subpoenas (the "subpoenas") Defendant Nancy R. Heinen ("Heinen") served on non-parties Bank of Alameda, Washington Mutual, Wells Fargo & Co., Western Sunrise Mortgage, California State University, Stanford University and her former employer (referred to herein as the "Investment Management Company")[1] (collectively, the "subpoenaed entities") on or about October 18, 2007, pursuant to Federal Rules of Civil Procedure 45(c)(1) and (3).

Ms. Howell respectfully calls upon the Court to quash the subpoenas and protect her from their overreaching scope and effects. This motion is brought on the grounds that the subpoenas (1) require disclosure of Ms. Howell's personal and private financial records; (2) seek information irrelevant to the dispute; (3) are impermissibly overbroad; (4) are not reasonably calculated to lead to the discovery of admissible evidence; and (5) are oppressive in light of the fact that Ms. Howell is not a party to this case. Defendant Heinen seeks Ms. Howell's private loan documents relating to real estate transactions even though she is only a witness in this securities fraud action brought by the Securities and Exchange Commission against Heinen. The private loan documents sought are collateral to the issues in this case. For these reasons, Ms. Howell respectfully requests that the Court quash the subpoenas.

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[1] The name of Ms. Howell's former employer is not specified in order to protect her privacy.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Erin J. Holland submitted herewith, the pleadings and other papers filed in this action, and such other matters and argument as the Court may consider at the time of the hearing. Counsel for Non-Party Howell and Defendant Heinen met and conferred by telephone on October 11, 17, and 22 in an attempt to narrow the issues raised by various subpoenas served by Defendant Heinen.

DATED: November 2, 2007

FOLEY & LARDNER LLP
THOMAS F. CARLUCCI
PAMELA L. JOHNSTON
ERIN J. HOLLAND

By: s/ Pamela L. Johnston
PAMELA L. JOHNSTON

ATTORNEYS FOR NON-PARTY,
WENDY HOWELL

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. This Action

On April 24, 2007, the Securities and Exchange Commission ("SEC") filed its complaint in this action against defendant Nancy R. Heinen (former General Counsel) and Fred D. Anderson (former Chief Financial Officer) for their involvement in the alleged backdating of stock options at Apple, Inc. ("Apple").[2] *See Securities and Exchange Commission v. Nancy R. Heinen and Fred D. Anderson,* Case No. 07-2214-HRL (N.D. Cal. filed April 24, 2007*)* ("Complaint"). Heinen is alleged to have twice engaged in a scheme to backdate stock option grants in order to provide herself and other Apple executives with more profitable stock options. *Id.* at ¶ 2. In both instances, Heinen is alleged to have personally falsified Apple's company records to hide this scheme, or to have directed her staff to do so. *Id.* at ¶¶ 2, 15, 19, 33, 41-45, 48.

As a result of this backdating scheme, Heinen is alleged to have reaped improper benefits of $1.6 million. *Id.* at ¶ 31. The SEC is seeking an order enjoining Heinen from committing future securities violations, requiring her to disgorge her ill-gotten gains, and barring her from serving as an officer or director of a public company. *Id.* at ¶ 4.

In 1997, Apple hired Ms. Howell as a full-time staff attorney. She worked for Defendant Heinen until Heinen's departure in the Spring of 2006. *See* Declaration of Erin J. Holland ("Holland Decl."), filed concurrently herewith. Ms. Howell may be called as a witness in this case, but Ms. Howell is not named as a defendant in this action nor in any related action.

B. The Subpoenas

On or about September 21, 2007, Defendant Heinen issued subpoenas to non-parties Bank of Alameda, Bank of the West, Washington Mutual, Wells Fargo & Co., Western Sunrise Mortgage, the Investment Management Company, California State University, Stanford

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[2] Defendant Anderson simultaneously settled with the SEC on April 24, 2007 without admitting or denying liability. *See* Securities and Exchange Commission, Litigation Release No. 20086, April 24, 2007, available at http://www.sec.gov/litigation/litreleases/2007/lr20086.htm.

University, the California State Bar and the California Department of Real Estate requesting a variety of Ms. Howell's personal and confidential records. Counsel for Defendant Heinen and Ms. Howell met and conferred by telephone on October 11, 17, and 22 in an attempt to resolve Ms. Howell's concerns about the information requested. As a result of these negotiations, counsel for Defendant Heinen agreed to withdraw the subpoenas issued to Investment Management Company, the California State Bar, California State University, Stanford University and the California Department of Real Estate in exchange for Ms. Howell's agreement to permit the production of certain narrow information.

On or about October 17, 2007 counsel for Defendant Heinen issued revised subpoenas to Bank of Alameda, Bank of the West,[3] Washington Mutual, Wells Fargo & Co., and Western Sunrise Mortgage seeking Ms. Howell's "Uniform Residential Loan Application (Freddie Mac Form 65 / Fannie Mae Form 1003) and all payment records" for three separate properties (individually identified herein as the "P Avenue property," the "K Avenue property," and the "H Avenue property") currently or formerly owned by Ms. Howell.[4]

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[3] Ms. Howell does not object to the Bank of the West subpoena in light of correspondence received from Bank of the West on September 26, 2007 and October 22, 2007 stating that Bank of the West notified Miles Ehrlich, counsel for Defendant Heinen, that it did not have any records of an account or mortgage for Ms. Howell for the time period specified.

[4] These properties are labeled in this way in order to protect the identification of the properties as this is a public filing not subject to a protective order.

The following chart summarizes the information requested by, and the status of, all of the pending subpoenas that Defendant Heinen issued or re-issued after meeting and conferring.

Subpoenaed Entity	Summary of Subpoena[5]	Current Status
1. Bank of Alameda 2. Washington Mutual 3. Wells Fargo & Co. 4. Western Sunrise Mortgage	The Uniform Residential Loan Application and all payment records concerning mortgage recipient Wendy Howell for the P Avenue property.	Ms. Howell objects to these subpoenas.
5. Bank of the West	The Uniform Residential Loan Application and all payment records concerning mortgage recipient Wendy Howell for the P Avenue property.	Because Bank of the West has indicated that it does not possess any records responsive to the subpoena, Ms. Howell does not object to this subpoena.
6. Washington Mutual	The Uniform Residential Loan Application and all payment records concerning mortgage recipient Wendy Howell for the K Avenue property.	Ms. Howell objects to this subpoena.
7. Wells Fargo & Co.	The Uniform Residential Loan Application and all payment records concerning mortgage recipient Wendy Howell for the H Avenue property.	Ms. Howell objects to this subpoena.
8. Investment Management Company	All personnel records maintained by the Investment Management Company related to former employee Wendy Howell, including but not limited to her application for employment, job descriptions, performance reviews, and all documents surrounding the termination of her employment.	In exchange for withdrawal of the subpoena, Ms. Howell agreed to ask the Investment Management Company to provide Ms. Heinen's counsel with a letter setting out the dates of her employment there, job titles, departments and job descriptions, and whether Ms. Howell's departure was voluntary.
9. California State University	All educational records maintained by the University related to Wendy Howell, including but not limited to: application for admission, registration documents, class schedules, attendance records, grades and financial aid documents.	In exchange for withdrawal of the subpoena, Ms. Howell agreed to the production of a redacted copy of her California State University transcript reflecting dates of attendance, business and accounting courses taken and grades received in accounting and business classes, but with all

[5] Personal information identified in the subpoenas, including Ms. Howell's date of birth and the specific addresses of the properties, has not been included in order to protect Ms. Howell's privacy.

Subpoenaed Entity	Summary of Subpoena[5]	Current Status
		other information redacted.
10. Stanford University	All educational records maintained by the University related to Wendy Howell, including but not limited to: application for admission, registration documents, class schedules, attendance records, grades and financial aid documents.	In exchange for withdrawal of this subpoena, Ms. Howell agreed to the production of a redacted copy of her Stanford University transcript reflecting dates of attendance and courses taken, but with all other information redacted, including grades received.
11. California State Bar	All documents concerning attorney Wendy Howell, including but not limited to her complete application for membership in the state bar, all admission documents, and any records of any disciplinary complaints, investigations, or actions brought against her.	Counsel for Ms. Heinen agreed to withdraw this subpoena.
12.-13. California Department of Real Estate (two subpoenas issued)	All documents concerning licensee Wendy Howell, including but not limited to her real estate license application documents and any complaints, disciplinary investigations and/or any other formal or informal actions taken with respect to her license.	Counsel for Ms. Heinen agreed to withdraw these subpoenas.

Given the highly personal and confidential nature of these personal financial materials, the irrelevance of these loan documents to this securities action, and the unlikelihood that these materials could possibly lead to the discovery of admissible evidence, Ms. Howell seeks this Court's protection.

II. ARGUMENT

A. This Court is Empowered to Quash the Subpoenas.

This Court has the power and duty to protect Ms. Howell, a non-party, from invasive and harassing discovery. Rule 45 of the Federal Rules of Civil Procedure provides that the court by which a subpoena was issued shall quash or modify the subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies" or if the subpoena "subjects a person to undue burden." Fed. Rule Civ. Proc. 45(c)(3)(A)(iii-iv). "If the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed * * * would be by definition 'undue'." *Pacific Gas and*

Elec. Co. v. Lynch, 2002 WL 32812098, *1 (N.D. Cal. Aug. 19, 2002) (citing *Compaq Computer Corp. v. Packard Bell Elec., Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995)).

On appeal, an order to quash is reviewed under the abuse of discretion standard. *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975) (citing cases).

B. Ms. Howell has Standing to Move to Quash the Subpoenas.

As an initial matter, Ms. Howell, though not a party to the action nor a recipient of a subpoena, does have standing to bring this motion. The determination of "whether a non-party has standing to quash a subpoena served on another non-party depends on the nature of the information sought." *First Indem. of America Ins. Co. v. Shinas*, 2005 WL 3535069, *3 (S.D.N.Y. Dec. 23, 2005). Generally, this test has been articulated as whether the moving party has a proprietary or personal interest in the information sought. *Rouson ex rel. Estate of Rouson v. Eicoff*, Slip Copy, 2006 WL 2927161, *7 (E.D.N.Y. Oct. 11, 2006) (citing cases). *See also, Gardias v. San Jose State University*, 2007 WL 2428031, *1 (N.D. Cal. Aug. 22, 2007); *Robertson v. Qadri*, Slip Copy, 2007 WL 2221075, *2 (N.D. Cal. Aug. 2, 2007), *Platinum Air Charters, LLC v. Aviation Ventures, Inc.*, 2007 WL 121674, *2 (D. Nev. Jan. 10, 2007); *G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc.*, 2007 WL 119148, *3 (D. Nev. Jan 9, 2007).

In *Broadcort Capital Corp. v. Flagler Securities, Inc.*, plaintiff issued a subpoena to US West, a non-party, for the telephone records of non-party Grant C. Record ("Mr. Record"). 149 F.R.D. 626, 628 (D. Colo. 1993). Plaintiff argued that neither the defendant nor Mr. Record had standing to quash the subpoena, and insisted that only US West could move to quash the subpoena. *Id.* While observing that "[h]istorically, it has been the case that only the served party could object to the subpoena," the court went on to state that the "[t]here is little doubt that a court has the power and duty to examine all appropriate issues dealing with persons affected by subpoena," including Mr. Record and the defendant. *Id.*

Accordingly, Ms. Howell has standing to quash these subpoenas because she has a legitimate privacy interest in her personal and private financial records sought by these subpoenas. *See, e.g., Catskill Dev., L.L.C. v. Park Place Enter. Corp.*, 206 F.R.D. 78, 93 (S.D.N.Y. 2002) (finding that non-party Native American tribe had standing to quash subpoena directed to tribe's bank because tribe had privacy interest in its banking documents); *Sierra Rutile Ltd. v. Katz*, 1994 WL 185751, *2 (S.D.N.Y. May 11, 1994) (non-parties had "a sufficient privacy interest in the confidentiality of records pertaining to their personal financial affairs so as to give them standing to challenge the subpoenas").

Additionally, Ms. Howell timely objected to the subpoenas in accordance with Fed. R. Civ. P. 45(c)(2)(B)'s requirement that objections be made within 14 days of service of the subpoenas. On October 5, 2007, Ms. Howell sent written objections to the September 21, 2007 subpoenas to Defendant Heinen's counsel.

C. The Subpoenas Invade the Privacy Rights of Ms. Howell, Who Is Not a Party to This Litigation.

As discussed *infra*, the subpoenas served on Bank of Alameda, Washington Mutual, Wells Fargo & Co., and Western Sunrise Mortgage for Ms. Howell's Uniform Residential Loan Application (Freddie Mac Form 65 / Fannie Mae Form 1003) and all payment records related to three separate properties have no relevance to any issues raised by this litigation. This is not a case about real estate or home loans. It is a case about Defendant Heinen's conduct at Apple. However, even if these subpoenas could be deemed to seek relevant information, they should be quashed because their broad scope unjustifiably invades the privacy of Ms. Howell, who is not even a party to the litigation. The law is well established that private information may be shielded from discovery if such disclosure would impair a person's privacy rights, which are guaranteed by the California Constitution and the United States Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); CA. Const. art. I, § 1; Judge William W. Schwarzer, Judge A. Wallace Tashima & James M. Wagstaffe, *Federal Civil Procedure Before Trial* ¶ 11:991, at 11-102 (2007) (noting that federal courts generally recognize that a right of privacy may be raised in response to discovery requests).

The importance of the right to privacy in personal financial information in particular is recognized in federal statutes requiring financial institutions to protect the security and confidentiality of their customers' personal information. 15 U.S.C. § 6801(a) ("each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information"). California courts have long recognized that an individual's Constitutional right to privacy includes one's confidential financial affairs. *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 20 (Cal. 1994); *Valley Bank of Nev. V. Superior Court*, 15 Cal. 3d 652, 656-658 (1975).

To determine whether private information should be disclosed, courts balance the need for the information sought against the claimed right of privacy. *Ragge v. MCA/Universal Studios*, 165 F.R.D. 601, 604-605 (C.D. Cal. 1995); *Ceramic Corp. of Am. V. Inka Maritime Corp.*, 163 F.R.D. 584, 589 (C.D. Cal. 1995). If the court decides that disclosure of the information should be compelled, "the scope of disclosure will be narrowly circumscribed; such an invasion of the right to privacy must be drawn with narrow specificity and is permitted only to the extent necessary for a fair resolution of the lawsuit." *Davis v. Leal*, 43 F.Supp.2d 1102, 1110-11 (E.D. Cal. 1999) (citing *Moskowitz v. Superior Court,* 137 Cal.App.3d 313, 316 (1982)). Accordingly, even if the Court found that the subpoenas would reveal some relevant evidence, the Court must carefully balance Defendant Heinen's need for such information with Ms. Howell's fundamental right of privacy.

The documents sought by the subpoenas reveal precisely the type of information that people consider to be sensitive and private. The Uniform Residential Loan Application form and payment history would reveal Ms. Howell's bank account numbers, assets and liabilities, income and debt history, how she paid for these properties, whether she has ever had any difficulty paying her mortgage, and whether she has ever filed for bankruptcy.[6] This is exactly the type of private and confidential information that should be protected from disclosure. *See Bramante v. Miceli*, Slip Copy, 2007 WL 2429350, *2 (S.D. Cal. Aug. 21, 2007) (recognizing that private information that is "typically protected from disclosure" includes bank account numbers, social security numbers and tax information).[7]

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[6] For the Court's convenience, a sample Uniform Residential Loan Application form is attached as Exhibit A. Portions that Defendant Heinen's counsel has agreed to redact are marked as such.

Weighing Ms. Howell's fundamental interest and right to privacy in her financial records against Defendant Heinen's overreaching and irrelevant requests for documents going back almost 15 years makes it clear that these subpoenas should be quashed. Counsel for Defendant Heinen has indicated that Ms. Howell's records are being sought for two reasons – one, to *attempt* to establish that Ms. Howell was under financial pressure during the 2001-2002 and 2006 time periods so as to give Ms. Howell motive "to do *anything*" to keep her job and two, for potential impeachment. Neither of these reasons, however, come close to outweighing Ms. Howell's considerable interest in protecting her personal and confidential financial information. Defendant Heinen's attempt at a fishing expedition through Ms. Howell's private financial information in the hopes of somehow shifting blame to Ms. Howell, who is not a defendant in this action nor any related action, offends the protections created by Rule 45 and should not be permitted.

By requesting these financial documents, Defendant Heinen is clearly engaging in an unwarranted fishing expedition. Courts have determined that "[t]here is no need to allow plaintiff a fishing expedition through the private financial records of a nonparty." *Adamson v. Radosevic*, 1998 U.S. Dist. Lexis 7987, *9 (B.C. Kan. 1988) (plaintiff served subpoenas duces tecum on two banks requesting all bank records regarding the accounts of two third parties; the court granted the motions to quash on the grounds that the third parties' privacy interest in their financial affairs plus the fact that they were not named as parties in the action required that the motions to quash be granted); *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. (Cal.) 1975) (district court did not abuse its discretion in finding that plaintiff's need for documents was insufficient to outweigh the burden and invasion of privacy which would have resulted to the non-party petitioners, "especially since they were not parties to the suit"); *In re Bergeson*, 112 F.R.D. 692, 695 (D. Mont. 1986) (noting that "sweeping requests for documents" constitute a "general fishing expedition" and are thus subject to a motion to quash).

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[7] If the Court would like to review the subpoenaed information *in camera*, Ms. Howell is amenable to working with the subpoenaed entities to arrange that. Such a review, however, is not required.

Accordingly, because Defendant Heinen cannot justify a need that outweighs Ms. Howell's interest in her personal and private financial information, the subpoenas must be quashed.

D. The Subpoenas Seek Irrelevant Information.

Courts have recognized that "[a]lthough irrelevance is not among the litany of enumerated reasons for quashing a subpoenas found in Rule 45, courts have incorporated relevance as factor when determining motions to quash a subpoena." *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (citing *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter*, 211 F.R.D. 658, 662 (D. Kan. 2003)).

As discussed *supra*, Defendant Heinen's counsel during the meet and confer process indicated that his client's interest in Ms. Howell's financial records was to establish that Ms. Howell was under financial pressure during the 2001-2002 and 2006 time periods so as to give Ms. Howell motive "to do *anything*" to keep her job. But this is not a real estate or loan fraud case, and Ms. Howell is not accused of having done anything wrong. It is Defendant Heinen's whose actions are being scrutinized for illegal behavior. Ms. Howell's real estate holdings and records have no relevance to the SEC's enforcement action against Defendant Heinen, and there is no evidence establishing a relationship between Defendant Heinen's requests and the claims and defenses in the present case

Given that this information is irrelevant to this litigation, and not reasonably calculated to lead to the discovery of admissible evidence, production of Ms. Howell's personal records is unwarranted and should not be permitted. *Eisemann v. Greene*, 1998 WL 164821, *2 (S.D.N.Y. 1998) (granting motion to quash on ground that enforcement of the subpoena would "constitute an unreasonable or burdensome misuse of the discovery process" where the requested information was of "doubtful and tangential relevance").

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E. Any Potential Impeachment Material Found would be Inadmissible at Trial.

Counsel for Defendant Heinen has indicated that they also seek Ms. Howell's personal and private financial records for potential impeachment. Any impeachment material that may be found in these documents, however, is inadmissible at trial. It is well-established that "a witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the witness's assertions about those facts." *U.S. v. Menefee*, 1992 WL 175915, *2 (9th Cir. July 28, 1992) (citing Edward W. Cleary et al., McCormick on Evidence § 47, at 110 (3d ed. 1984)). "Collateral facts are those which are not relevant to the substantive issues in the case." *Id.* Because Ms. Howell's personal financial information is not logically relevant to establish *any* fact at issue in the SEC's enforcement action against Defendant Heinen, Ms. Howell may not be impeached by any contradiction that may be found in Ms. Howell's financial documents.

F. The Subpoenas are Impermissibly Overbroad and Seek Collateral Information.

The subpoenas should also be quashed because they are overbroad. Federal courts have quashed subpoenas that were overbroad and sought information with only tangential relevance to the facts being litigated. *See, e.g., Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (quashing non-party subpoena because it sought information irrelevant to the issues presented in the case and because it was "overbroad on [its] face"); *Nocal, Inc. v. Sabercat Ventures, Inc.*, 2004 WL 3174427, *3 (N.D. Cal. Nov. 15, 2004) (quashing subpoena because "the categories of documents requested by the subpoena are overly broad and irrelevant").

These subpoenas are strikingly overbroad. First, the subpoenas seek information that is simply beyond the time scope of this action. Though Defendant Heinen's counsel has indicated that their interest is for 2001-2002 and 2006 time periods, counsel has made no attempt to limit the requested material to those time periods for *any* of the subpoenas. For example, the H Avenue property, for which a subpoena was issued to Wells Fargo & Co, was purchased in or around 1993 and sold in 1999. Ms. Howell did not even begin working at Apple until 1997, making the relevance of her loan application documents in 1993 inconceivable. Similarly, the P Avenue property was purchased in 1998 and the K Avenue property purchased in 1999. If

Defendant Heinen is genuinely only interested in the type of financial pressure Ms. Howell may have been under in 2001-2002 and 2006, the request could have been narrowed to seek Ms. Howell's mortgage payment amounts for those time periods. Instead, the subpoenas seek the entire loan applications and unlimited payment histories for all three properties.

Second, the subpoenas are overbroad because they seek information that is, at best, collateral to this action. Again, this is an SEC enforcement action brought against Defendant Heinen, not a loan fraud case. Even assuming *arguendo* that Defendant Heinen can make a showing that the information sought is potentially relevant, it would be of tangential relevance at best.

Accordingly, because the subpoenas at issue here are not limited to matters that might bear on Ms. Howell's credibility as a witness or even to the time period Defendant's Counsel has stated that they are interested in, namely 2001-2002 and 2006, compliance with the subpoenas imposes the unjustified burden on Ms. Howell of having her personal and confidential financial records produced and inspected. *Concord Boat Co. v. Brunswick Corp.*, 169 F.R.D. 44, 50, 53 (S.D.N.Y. 1996) (citing *In re Int'l Business Machines*, 83 F.R.D. 97, 104, 106-07 (S.D.N.Y. 1979)) ("[t]o the extent a subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the greater risk of being found overbroad and unreasonable").

Because the subpoenas are not limited to matters directly bearing on the issues raised in this action, the subpoenas must be quashed.

G. The Subpoenas are Designed to Harass A Potential Witness.

This Court is empowered to quash subpoenas that are used to harass or annoy. *See Mattel Inc.* v. *Walking Mountain Prods.*, 353 F.3d 792, 813 (9th Cir. 2003) (affirming trial court order to quash subpoena where trial court concluded that the subpoena was "served for the purpose of annoying and harassment and not really for the purpose of getting information" because subpoena was overly broad, abusively drawn and "[n]o attempt had been made to try to tailor the information request to the immediate needs of the case").

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Given the considerable overbreadth, irrelevance and confidential nature of the financial documents requested by Defendant Heinen, it appears that Defendant Heinen is, in short, on a fishing expedition that is designed to harass, annoy or embarrass Ms. Howell, who is not even a party to this action. As such, Ms. Howell seeks the protection of the Court from such unrestricted disclosure, as afforded under Fed. R. Civ. P. 45.

H. Ms. Howell Reserves Her Objections to the California State University, Stanford University and Investment Management Company Subpoenas.

As discussed *supra,* counsel for Ms. Howell and Defendant Heinen have agreed that in exchange for Ms. Howell's production of certain information, Defendant Heinen will withdraw the subpoenas to California State University, Stanford University and the Investment Management Company. Though counsel foresees that this agreement will be accomplished by the time of the hearing on this motion, Ms. Howell includes her objections to the California State University, Stanford University, and the Investment Management Company subpoenas in the event counsel is unable to satisfactorily fulfill this agreement.

(1) Personnel Records

Defendant Heinen seeks Ms. Howell's *entire* personnel file from her former employer, the Investment Management Company. Disclosure of these records would violate Ms. Howell's right to privacy. *Matter of Hawaii Corp.*, 88 F.R.D. 518, 525 (D.C. Hawaii 1980) (personnel files protected in recognition of "strong interests of employees' privacy" and the need for candid performance evaluations by the employer); *New York Stock Exchange, Inc. v. Sloan,* 22 Fed.R.Serv.2d 500, 503 (S.D.N.Y. 1976) (refusing to compel production of defendant's personnel files, which were the type of records "employees justifiably expect to be kept confidential" and that to reveal their contents "would invade the employees' privacy"). Accordingly, Defendant Heinen must make a showing of compelling need and clear relevance. *Matter of Hawaii Corp.*, 88 F.R.D. 518 at 524; *Gattegno v. Price Waterhousecoopers, LLP*, 205 F.R.D. 70, 73 (D. Conn. 2001) (Discovering party must show both relevancy of the information sought and a *compelling* need for the production of tax information.).

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Ms. Howell's employment application, job description, performance reviews and documents related to her separation from a company not at issue in this case bear no direct relevance to her status as a potential witness. However, even if this information is found to be relevant, Defendant Heinen has the burden of showing that her need for discovery of the requested information outweighs Ms. Howell's considerable right to privacy. Thus, this information is not discoverable and should be protected from discovery by this court.

(2) Educational Records

Subpoenas issued to California State University and Stanford University for "all educational records maintained by the University related to Wendy Howell . . . including but not limited to: application for admission, registration documents, class schedules, attendance records, grades and financial aid documents" should also be quashed. These documents are not only irrelevant, but they also contain personal and private information, including the financial information of Ms. Howell's family members, who have absolutely no connection to this matter.

Congress, recognizing that students have an expectation of privacy in their educational records enacted the Family Education and Privacy Rights Act ("FERPA") to protect that expectation. 20 U.S.C. § 1232g (1982); Act of Dec. 31, 1974, Pub.L. No. 93-568, 1974 U.S. Code Cong. & Ad. News 6779. FERPA provides that federal funds shall be withdrawn if a school or university reveals records containing identifying data, including academic work, to persons outside an educational institution without a students' consent. *Id.* Although the statute does not, by its express terms, exempt school records from discovery under the Federal Rules of Civil Procedure, this does not mean that a student's privacy or confidentiality interest in her education records is automatically overridden whenever a subpoena is sent to review them. As one district court noted "privacy violations are no less objectionable simply because release of the records is obtained pursuant to judicial approval unless, before approval is given, the party seeking disclosure is required to demonstrate a genuine need for the information that outweighs the privacy interest of the students." *Rios v. Read*, 73 F.R.D. 589, 599 (D.C.N.Y. 1977) (citing Sen. Rep. No. 93-1026, 93rd Cong., 2nd Sess. 187, reprinted in (1974) U.S. Code Cong. & Admin. News, p. 4251).

Given FERPA's underlying privacy concerns, a party has a higher burden seeking access to student records to justify disclosure than with the discovery of other types of non-private records. *Ellis v. Cleveland Municipal School Dist.*, 309 F.Supp.2d 1019, 1023 (N.D. Ohio 2004); *Rios v. Read,* 73 F.R.D. 589, 598 (D.C.N.Y. 1977); *Krauss v. Nassau Community College,* 469 N.Y.S.2d 553, 555 (N.Y. Sup. 1983). Because Defendant Heinen cannot offer sufficient evidence to demonstrate the substantial relevance of the educational records to override Ms. Howell's privacy interest in her educational records, disclosure must be denied. *Yu Lin v. University of Nebraska*, 2006 WL 680898, *1 (D. Neb. Mar. 16, 2006) (citing FERPA's underlying privacy concerns in granting a protective order to prevent the plaintiff from requesting academic records of other students "in the absence of a definite explanation by plaintiff about why she needs the requested records").

III. CONCLUSION

For the foregoing reasons, Ms. Howell respectfully requests that this Court enter an order granting Ms. Howell's motion to quash the subpoenas in their entirety or, in the alternative, issue a protective order limiting the scope of the requested discovery to documents directly bearing on core issues in this case.

DATED: November 2, 2007

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